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19 UNITED STATES OF AMERICA

20 UNITED STATES DISTRICT COURT

21 FOR THE CENTRAL DISTRICT OF CALIFORNIA

22 UNITED STATES OF AMERICA,

23 ED CR No. 18-231-JGB

24 Plaintiff,

25 v.
26 GOVERNMENT'S OBJECTIONS TO
27 DEFENDANT JOHN JACOB OLIVAS'S
28 NOTICE OF UNDER SEAL, IN CAMERA,
29 AND EX PARTE APPLICATIONS; EXHIBIT

30 JOHN JACOB OLIVAS,

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This response is based upon the attached memorandum of points and authorities, the attached exhibit, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: August 26, 2020

Respectfully submitted,

NICOLA T. HANNA
United States Attorney

BRANDON D. FOX
Assistant United States Attorney
Chief, Criminal Division

JOSEPH B. WIDMAN
Assistant United States Attorney
Chief, Riverside Branch Office

/s/
JULIUS J. NAM
ELI A. ALCARAZ
Assistant United States Attorneys

Attorneys for Plaintiff
UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 In 2011 and 2012, defendant John Jacob Olivas ("defendant") used
4 his position and power as a federal law enforcement agent to sexually
5 abuse two of his intimate partners, N.B. and K.L., and to prevent
6 them from reporting his sexual assaults, as well as other acts of
7 violence, to law enforcement. Defendant's abuse of his federal law
8 enforcement authority violated the victims' constitutional rights:
9 namely, their rights to liberty and bodily integrity. For three
10 specific sexual assaults of K.L. and N.B., defendant is charged with
11 three counts of deprivation of rights under color of law, in
12 violation of 18 U.S.C. § 242.

13 On August 18, 2020, defendant filed a notice of manual filing or
14 lodging in which the only description provided was: "Ex Parte
15 Application to File In Camera; Proposed Order in the Alternative, and
16 In Camera Documents." (Dkt. No. 57.) Despite repeated inquiries to
17 defendant's counsel regarding the nature of this filing, the defense
18 has not responded to government counsel.

19 The government assumes that the defense is seeking issuance of
20 subpoenas pursuant to Rule 17 of the Federal Rules of Criminal
21 Procedure and that the defense is asking for permission to do so
22 while attempting to prevent the government from being heard about the
23 propriety of its requests.

24 The government objects to the *in camera* nature of defendant's
25 filings and to the issuance of any subpoenas, unless the government
26 is afforded the opportunity to be heard on the validity of these
27 subpoena requests. It is not fair to deprive the government of the
28 opportunity to contest the defense's subpoena requests.

1 The government acknowledges that in the appropriate
2 circumstances a trial subpoena for records to third parties could be
3 appropriate under Rule 17. But without the opportunity to evaluate
4 particular subpoena requests, or the documents returned by the third
5 parties, the government is in the dark about what documents defendant
6 is seeking, or from whom. As a general matter, the government is
7 concerned that shutting it out of the process leading to the approval
8 of *in camera* subpoenas and the parties' review of the resulting
9 documents has the potential to unfairly prejudice the government.

10 Since the government has no idea what subpoenas the defense may
11 be seeking, the government does not categorically oppose all
12 *in camera* requests for Rule 17 subpoenas in this case. Instead, by
13 submission of this brief, the government seeks to provide some
14 background law to the Court regarding what is – and what is not –
15 permitted by Rule 17, to submit for the Court's consideration orders
16 issued by other district judges in this district in comparable
17 situations, and to offer the Court the benefit of a walled-off
18 Assistant United States Attorney (a "taint AUSA") to represent the
19 government at every, or any, stage of the *in camera* process and the
20 return of documents.

21 **II. RULE 17 DOES NOT ALLOW "FISHING EXPEDITIONS" FOR
22 POTENTIAL IMPEACHMENT MATERIAL**

23 **A. General Requirements for a Rule 17(c) Subpoenas**

24 Rule 17 of the Federal Rule of Criminal Procedure provides for
25 the issuance of subpoenas to compel the testimony of witnesses at
26 criminal proceedings and the production of evidentiary documents.
27 Fed. R. Crim. P. 17. But a subpoena *duces tecum* issued under Rule 17
28 has a limited purpose: to procure evidence that will be introduced at

1 the attendant proceeding, usually trial. *United States v. Nixon*, 418
2 U.S. 683, 698-99 (1974).

3 In *Nixon*, the Supreme Court held that the proponent of the
4 subpoena must "clear three hurdles: (1) relevancy;
5 (2) admissibility; (3) specificity." *Nixon*, 418 U.S. at 699. As
6 courts have noted, the failure to show relevance, admissibility, and
7 specificity indicates the requested Rule 17 subpoena is an
8 impermissible fishing expedition. See, e.g., *United States v.*
9 *Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fla. 1991) ("If the moving
10 party cannot reasonably specify the information contained or believed
11 to be contained in the documents sought but merely hopes that
12 something useful will turn up, this is a sure sign that the subpoena
13 is being misused.").

14 *Nixon* further provides that even upon a showing that the
15 subpoena seeks relevant, admissible, and specific evidence, a court
16 must also consider whether the materials are "(2) . . . not otherwise
17 procurable reasonably in advance of trial by exercise of due
18 diligence; (3) that the party cannot properly prepare for trial
19 without such production and inspection in advance of trial and that
20 the failure to obtain such inspection may tend unreasonably to delay
21 the trial; and (4) that the application is made in good faith and is
22 not intended as a general 'fishing expedition.'"

23 Rule 17(c) plainly requires a showing of relevancy,
24 admissibility, and specificity to support a subpoena for documents.
25 Further, Rule 17(c)(2) allows the Court to consider a motion to quash
26 if the subpoena is unreasonable or oppressive. Upon the filing of a
27 motion to quash, it is the defendant's burden to show that the
28 requested documents are relevant, admissible, and the request is

1 sufficiently specific. *Nixon*, 418 U.S. at 700. As fully discussed
2 below, defendant cannot meet his burden if the subpoena is for a
3 purpose beyond the scope of Rule 17: to gather "discovery"
4 information. If the subpoena is nothing more than a "fishing
5 expedition," it is unreasonable and oppressive and must be quashed.

6 **B. A Rule 17(c) Subpoena Cannot Be Used to Seek Discovery**

7 Courts have long held that, given the detailed rules set forth
8 in Rule 16 of the Federal Rules of Criminal Procedure ("Rule 16")
9 regarding the government's disclosure obligations before and during
10 trial, a defendant may not circumvent Rule 16 by seeking broader
11 discovery through the use of Rule 17(c) subpoenas to government
12 agencies. As the Supreme Court long ago made clear in *Bowman Dairy*
13 *Co. v. United States*, "[i]t was not intended by Rule 16 to give a
14 limited right of discovery, and then by Rule 17 to give a right of
15 discovery in the broadest terms. . . . Rule 17(c) was not intended
16 to provide an additional means of discovery." 341 U.S. 214, 220
17 (1951). As a result, Rule 17(c) subpoenas in general are not proper
18 if "intended as a general 'fishing expedition.'" *Nixon*, 418 U.S. at
19 700. "[Rule 17's] chief innovation was to expedite the trial by
20 providing a time and place before trial for the inspection of the
21 subpoenaed materials. *Bowman Dairy*, 341 U.S. at 220. Hence, any
22 attempt to justify the subpoena as a method in order to obtain
23 documents and objects "material to preparing the defense" pursuant to
24 Rule 16(a)(1)(E)(i), is to no avail.

25 The Ninth Circuit in *United States v. Reed*, 726 F.2d 570, 577
26 (9th Cir. 1984), determined the district court properly quashed a
27 Rule 17 subpoena where the defendant had sought entire arson
28 investigation files, not specific documents. The Ninth Circuit

1 stated "Rule 17(c) was not intended as a discovery device, or to
2 'allow a blind fishing expedition seeking unknown evidence.'" *Id.*
3 (citation omitted). That court also commented that the defendant did
4 not establish admissibility of the subpoenaed files.

5 Any subpoenas requested in this case, like the one in *Reed*, may
6 seek a large swath of documents (such as files maintained by the
7 California Department of Social Services for the victims in this
8 case), not specific records. If the subpoenas seek a large variety
9 of documents, it is unclear how such an array of documents would be
10 admissible. See *United States v. Richardson*, 607 F.3d 357, 368 (4th
11 Cir. 2010) ("The subpoena duces tecum is not intended to provide a
12 means of pretrial discovery").

13 Defendant has the burden to establish admissibility of the
14 materials, the relevance of the materials sought by the subpoenas,
15 and that the subpoena request is a specific one. Failure to any one
16 of the elements specifically makes quashing the subpoenas
17 appropriate. Information in the possession, custody and control of
18 the government that falls under its *Brady* disclosure obligations is
19 not the type of material a Rule 17(c) subpoena was designed to reach.
20 See *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981).

21 **C. Defendant's Subpoenas Must Seek Only Relevant, Specific,
22 and Admissible Materials**

23 The following subsections offer some analysis on how the above
24 principles may apply to any *in camera* subpoena requests. The
25 government also offers as Exhibit 1 an order issued by another
26 district judge in the Central District when addressing an *in camera*
27 request for Rule 17 subpoenas in a criminal case.

1 In the event defendant requests Rule 17 subpoenas for documents,
2 the government submits that defendant must show that the documents
3 sought by his proposed *in camera* subpoenas are "(1) relevant; (2)
4 admissible; and (3) specific." *Nixon*, 418 U.S. at 699. Unless
5 defendant can make these showings, the Court should not authorize the
6 subpoenas.

7 To meet his burden, defendant cannot merely offer the defense's
8 hope that these subpoenas will lead to documents which the defense
9 can use on cross-examination or during the defense case. That would
10 not be enough. Similarly, if defendant seeks entire categories of
11 documents, such subpoenas would be defective as not sufficiently
12 specific.

13 **III. STANDING AND RULE 17 SUBPOENAS**

14 In the event any of the requested Rule 17 subpoenas are directed
15 to a federal agency, the government has standing to quash any such
16 subpoenas. The United States Attorney is the authorized
17 representative of the United States and has authority to quash
18 improper subpoenas issued to employees of the United States. See 28
19 U.S.C. § 516 ("[T]he conduct of litigation in which the United
20 States, an agency, or officer thereof is a party, or is interested
21 . . . is reserved to officers of the Department of Justice, under the
22 direction of the Attorney General."); Fed. R. Crim. P. 1(b)(1)(B)
23 ("'Attorney for the government' means . . . a United States attorney
24 or an authorized assistant.").

25 When a federal government employee, such as the General Counsel
26 for a government agency, is subpoenaed, the United States Attorney's
27 Office is the appropriate entity to appear on behalf of the agency in
28 court. The role of the United States Attorney's Office in this

1 regard has been recognized by the courts. See, e.g., *United States*
2 *v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981) (allowing the
3 government, i.e., the U.S. Attorney's Office, to move to quash a
4 defense subpoena served on the Department of Education); *United*
5 *States v. Rainieri*, 670 F.2d 702, 712 (7th Cir. 1982) (recognizing the
6 government's right to challenge defense subpoena to government
7 witness).

8 **IV. ALL SUBPOENAED DOCUMENTS SHOULD BE MADE AVAILABLE TO THE
GOVERNMENT**

9
10 Rule 17(c)(1) provides that the Court "may direct" the party
11 upon whom a Rule 17 subpoena is served to "produce the designated
12 items in court before trial or before they are to be offered in
13 evidence." Assuming the Court authorizes the issuance of the Rule 17
14 subpoenas sought by defendant, and upon review of the produced items
15 finds that such materials have been obtained in compliance with Rule
16 17, the government would have no objection to early production of the
17 documents for dissemination to the defense at the time of the pre-
18 trial conference. But the government requests that *it also* be given
19 copies of all documents produced pursuant to any such subpoenas,
20 pursuant to Rule 17(c)(1).

21 Providing such documents to the government would not reveal the
22 defense's litigation strategy. The government already knows that the
23 defense will seek to impeach its likely witnesses – the victims of
24 defendant's sexual abuse. Keeping these documents from the
25 government would subject it and the witnesses to unfair surprises
26 during trial and would prevent the government from conducting follow-
27 up investigation to learn and present to the jury all relevant facts
28

1 surrounding any prior instances of alleged misconduct or dishonesty
2 by government witnesses.

3 **V. AVAILABILITY OF A TAIN T AUSA TO REPRESENT THE UNITED STATES IN
4 *IN CAMERA* PROCEEDINGS**

5 If the Court is inclined to allow the defense to submit *in*
6 *camera* requests for Rule 17 subpoenas, then the government requests
7 that an AUSA who is not affiliated with the prosecution of this
8 matter – and who would remained walled off from the trial team – be
9 allowed to participate in the *in camera* litigation of this matter.
10 The taint AUSA would also be available to represent the government's
11 interests with respect to defendant's *in camera* requests for Rule 17
12 subpoenas and the Court's post-issuance consideration of whether the
13 produced documents may appropriately be produced to the parties under
14 Rule 17.

15 **VI. CONCLUSION**

16 The government respectfully objects to the *in camera* nature of
17 these subpoena requests. It also offers the above legal authorities
18 and analysis for the Court in its consideration of any *in camera* Rule
19 17 subpoena requests it may consider. Also, for the foregoing
20 reasons, the government respectfully requests that it be given copies
21 of all documents produced to the court in response to any such Rule
22 17 subpoenas and that a taint AUSA be permitted to represent the
23 government's interests in the *in camera* litigation as set forth
24 above.

25

26

27

28

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. CR 05-1111(A)-RGK

Date February 8, 2007

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGEInterpreter None

Sharon L. Williams

Not Reported

Matthew Umhofer, Not Present

Deputy Clerk

Court Reporter/Recorder, Tape No.

Assistant U.S. Attorney

U.S.A. v. Defendant(s):Present Cust. BondAttorneys for Defendants:Present App. Ret.

JOSE MURILLO

N X

Mark Windsor

N X

**(IN CHAMBERS) GOVERNMENT'S MOTION TO QUASH DEFENDANT'S
Proceedings: SUBPOENAS TO FEDERAL AND STATE CORRECTIONAL FACILITIES**

The government moves the Court to quash subpoenas issued by the Court on behalf of Defendant Jose Murillo.

Defendant's subpoenas seek recorded telephone calls, disciplinary reports, housing records, grievances, confidential files, and all records related to protective custody for CW1 and J.W. Similar requests have been made regarding CW4, including visitor logs for that witness. The subpoenas have been served on a host of institutions: the United States Penitentiaries at Lompoc, Atwater, Big Sandy, and Victorville; the Federal Correctional Institutions at Terminal Island and Sheridan, Oregon; and local institutions including San Bernardino County Central Detention Facility, the California state prisons, the Los Angeles County Jail, and the Alhambra City Jail.

Subpoenas issued under Federal Rules of Criminal Procedure ("Rule") 17(c) should not be employed as a discovery device. *United States v. Nixon*, 418 U.S. 683, 698-99 (1984). A criminal defendant cannot use subpoenas to circumvent the discovery limitations of Rule 16. However, it appears that Defendant's subpoenas seek to do precisely this. The subpoenas relate only to government witnesses for whom the government has clear discovery obligations. At this time, the Court has no reason to assume that the government is not meeting its discovery obligations under Rule 16. If, however, the government is not complying with its discovery obligations, the proper channel for Defendants is to bring a discovery motion.

Compelling safety and privacy issues are at stake. There is no question that incarcerated witnesses face grave danger in prison. Numerous federal courts have recognized the dangers posed to inmates branded "snitch." *See Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001). Revealing the locations of government witnesses and their personal information requested by Defendant would expose those inmates to danger.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Finally, Defendants subpoenas are extremely broad. Subpoenas may not be used by a defendant in a “fishing expedition.” *Nixon*, 418 U.S. at 698-99. The party issuing the subpoena must be able to establish that (1) the documents sought are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend to unreasonably delay the trial; and (4) the application is made in good faith and is not intended as a general “fishing expedition.” *Nixon*, 418 U.S. at 700.

Defendant has not made the requisite showing. Absent a showing that the subpoenas are necessary above and beyond the channels of discovery under Rule 16, the Court finds that the subpoenas are improper.

Accordingly, the government's motion to quash is hereby **granted**.

IT IS SO ORDERED.

Initials of Deputy Clerk slw